71-356

Supreme Court of the United States

OCTOBER 1971 TERM

No. .....

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

CITY TRADE & INDUSTRIES, LTD.,

Petitioner,

—against—

ALLAHABAD BANK, LTD., BANK OF BARODA, LTD., and BANK OF TOKYO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner City Trade & Industries, Ltd. hereby petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. The opinion of the United States Court of Appeals for the Fifth Circuit herein is reported at —— F. 2d ——, and is reprinted herein at Appendix A, page 1-a. The prior opinion of the United States District Court for the Southern District of Georgia is reported at 310 F. Supp. 6 and is reprinted in Appendix B, page 47a.

The Jurisdiction of This Court

This Court has jurisdiction over this case by virtue of 28 USC §1254(1). The opinion of the Court of Appeals for the Fifth Circuit was rendered on May 5, 1971. On June

10, 1971 that Court denied petitioner's motion for reargument.

Question Presented

Can a United States district court grant summary judgment to a group of banks alleged to be holders in due course of negotiable instruments based solely upon a decision of a state court in a litigation between the maker and the payor of the notes in which the state court summarily ordered arbitration relying solely upon statement made by an attorney without personal knowledge?

Rules Involved

This case involves numerous provisions regulating civil practice both in the federal and New York State courts. The most significant of such provisions is Rule 56 of the Federal Rules of Civil Procedure which reads as follows:

> Rule 56. SUMMARY JUDGMENT.
>
> (a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> (b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served there-

with. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Statement of the Facts

The opinion of the Fifth Circuit set forth the factual background of its decision as follows:

> "City Trade & Industries, Ltd., a New York corporation [CTI], the appellant herein and a defendant-third party plaintiff below, entered an agreement in 1959 with New Central Jute Mills, a concern in India, which produces jute backing for rugs and carpets. By the terms of the agreement, CTI was appointed New Central's exclusive distributor for the sale of jute backing in the United States for a period extending to March 31, 1964. CTI alleges that under this agreement financing between itself and New Central was arranged especially for New Central's convenience to enable New Central to comply with the laws of India.
>
> "According to CTI, the laws of India prohibited New Central from exporting jute to the United States unless there existed in the United States a purchaser who had paid or promised to pay for the goods in United States dollars. Further, CTI claims that New Central was required by the laws of India
>
> > to engage in the export of jute only with the permission [of] the Reserve Bank of India [which, incidentally, CTI identifies with the Banks in the instant action, since, according to CTI, the Banks herein are members of the Reserve Bank].
>
> "CTI then charges that
>
> > [s]uch permission was obtained from the Reserve Bank by New Central with respect to each and every shipment of jute by New Central to CTI during the years 1959 through 1964. The permission thus granted by the Reserve Bank to New Central required that New Central's shipments of

> jute would be paid for by CTI within 180 days in United States dollars, and in representing the transactions to the Reserve Bank, New Central formerly [sic] characterized CTI as a purchaser of New Central's jute. In point of fact, however, the Reserve Bank has full knowledge of the relationship between New Central and CTI as that of principal and exclusive distributor and selling agent for New Central. . . .

"Consequently, CTI alleges, it made payments for jute exported to the United States to meet sales commitments it had made in New Central's behalf, as if it, CTI, were the purchaser. For the purpose of making these payments, CTI established irrevocable letters of credit in favor of New Central for ninety-five percent of the cost of freight port of distribution price. For the remaining 5% of the cost and freight price, New Central drew sight drafts upon CTI payable within 90 days. As a general rule, the source of payment of the drafts at maturity was the proceeds of the sale of jute by CTI in the United States. Occasionally, however, New Central exported jute to the United States when no actual sale of the jute had been made. When this occurred, the jute would be delivered to the account of CTI as buyer and stored until market conditions were favorable to a sale. In these instances, the invoice was accompanied by a draft drawn by New Central on CTI, which CTI would accept in exchange for the documents of title to the jute. Generally, the drafts were payable within ninety days. If CTI had not managed to sell the jute within the ninety day period, CTI would require outside funds to pay the outstanding drafts. CTI would then turn to James Talcott, Inc., a factor, and the plaintiff-appellee herein, who would advance the needed funds in exchange for a first security interest in quantities of jute.

"The relationship between New Central and CTI proceeded on the basis described above until 1964, when

the 1959 agreement expired. The parties attempted, but failed, to negotiate a new contract; and so in 1964 they ceased doing business together. At this time there was allegedly over $900,000.00 in drafts outstanding against CTI, and inventory in CTI's possession representing payments by CTI to New Central allegedly approximating $3,500,000.00. CTI contends that New Central agreed to take over this inventory against payment to CTI of the cost plus expense incurred by CTI in holding the goods, and that in exchange CTI would pay the outstanding drafts of $900,000. According to CTI, however, New Central never paid the stated amount and CTI therefore sold certain of the jute over which it had control and reduced the claimed debt owing to approximately $1,500,000.

"At this point, the Indian Banks, to whom New Central had negotiated the drafts, filed a suit of attachment against the remaining jute in Chatham County Superior Court, in the State of Georgia. The Banks were suing as purported holders of CTI's outstanding drafts, claiming that CTI was indebted on those drafts and was selling the property liable for the payment of the drafts to avoid payment of its debt. *City Trade & Industries* v. *Allahabad Bank, Ltd., et al.*, 114 Ga. App. 12, 150 S.E.2d 182 (1966).

"During the pendency of these attachment proceedings, the price of jute skyrocketed, so all the parties agreed to release the jute for sale to the order of James Talcott, Inc. Talcott was then to hold the fund derived from the proceeds, allegedly as a neutral stakeholder, awaiting a resolution of the various conflicting claims to the money.

"Shortly after the sale of the jute, CTI instituted a separate proceeding in New York, in June 1965, against New Central for an accounting on their 1964 agreement. The suit, however, was not prosecuted by either party for two years, for reasons not entirely clear from

the record, but apparently at the agreement and convenience of both parties.

"Meanwhile, back in Georgia, the Indian Banks, on February 7, 1966, instituted garnishment proceedings in the Georgia courts against Talcott, who was holding the contested fund. And, not to be outdone, CTI sued Talcott on April 12, 1966, in the Supreme Court of the State of New York, claiming the sole right to the proceeds of the jute sale held by Talcott. Thus besieged, Talcott in October 1966 instituted this statutory interpleader action in federal district court in Georgia." *

Meanwhile, in the New York action in April 1967, after the Georgia court had ordered that a third party summons and third party complaint in the interpleader action be served upon New Central, New Central moved in the New York court by order to show cause, returnable on two days' notice, for an order staying the then dormant action pending arbitration.

CTI opposed this motion in an affidavit by its New York counsel, Gabriel Kaslow. As one of the grounds advanced against granting the motion, Mr. Kaslow contended that New Central had instituted the attachment actions ostensibly in the name of the Indian Banks against CTI in the Superior Court of Georgia, County of Chatham, and a similar action in the Superior Court of Delaware, New Castle County. As a consequence, the institution of such litigation, CTI contended, constituted *a waiver of* New Central's arbitration rights afforded it under its agreement with CTI.

* This summary omitted that an attachment was obtained by the respondent Bank of Tokyo against a shipment of jute belonging to Petitioner in the Superior Court of the State of Delaware, New Castle County. This attachment was ultimately lifted by agreement between the parties and the proceeds also turned over to Talcott.

As later events demonstrated, CTI was attempting to establish an extremely difficult proposition, namely that the Indian Banks were acting as the alter-egos of New Central in the Georgia and Delaware litigations. Of course if that was established, then the Indian Banks could not be holders in due course but the converse was not true—if the Indian Banks were not the alter-egos of New Central in the Georgia and Delaware actions, they were not necessarily holders in due course. Indeed, such a determination would not even preclude a finding that the Indian Banks were the alter-egos of New Central for other purposes not connected with the litigations.

Mr. Kaslow's affidavit was answered by an affidavit of New Central's then New York counsel, Burton J. De Fren. That affidavit was in no way claimed to be on personal knowledge. Mr. De Fren stated with respect to the alter-ego contention of CTI as follows:

> "The second basis for opposition to the within motion is that Plaintiff has been sued in the State Courts of Georgia and Delaware concerning transactions arising out of the contract. This ground is interesting, but neither informative nor relevant. The fact of the matter is that the action in the State Courts of Georgia and Delaware were not instigated or instituted by Defendant herein, but by several banks which are holders in due course of certain drafts made by Plaintiff herein payable to the order of Defendant herein and accepted by Plaintiff and thereafter negotiated by Defendant herein to the said banks. No matter how hard Plaintiff may try to merge Defendant's identity with the banks; the fact is otherwise. The banks purchased the drafts from Defendant in the normal course of business and attempted to receive payment thereon from Plaintiff. Upon dishonor of the drafts by Plaintiff, the banks brought suit against Defendant. Reams and reams of

> paper cannot vitiate that the banks were and are holders in due course and that Plaintiff herein is the debtor primarily liable under said drafts. Plaintiff made and accepted the drafts as consideration for merchandise purchased from the Defendant. Defendant thereafter negotiated those drafts for value to the banks. Defendant and the banks are separate and independent entities. One is not the alter ego of the other. Much as Defendant would like to control the banks, it alas, has no power to do so. *In any event, the relationship between the banks and the Defendant herein and between the banks and the Plaintiff herein is entirely irrelevant to the purposes of this lawsuit.*" (Emphasis added.)

Mr. De Fren's statement asserts in a subordinate clause that the Indian Banks were holders in due course, but Mr. De Fren's statement did not attempt to prove that the Indian Banks were holders in due course other than by asserting that contention. Mr. De Fren concluded by stating that the relationships between the Indian Banks, New Central and CTI were "entirely irrelevant", which, aside from the issue of whether the Indian Banks were acting for New Central in the Georgia and Delaware actions, is entirely correct.

New Central's motion eventually came on to be heard by Justice Joseph A. Sarafite. Justice Sarafite ordered a trial on the issue of the legality of the contract between New Central and CTI, but ruled against all other contentions of CTI. With respect to the alter-ego argument based solely upon the affidavits before him, he stated:

> "It is sufficient to note that the actions instituted in these other forums were brought by banks who were holders in due course of drafts executed by plaintiff. It strains credulity to conclude, as plaintiff urges, that

these other parties are defendant's 'alter egos acting at [its] instigation and command.'"

Justice Sarafite's statement that the Indian Banks were holders in due course was obviously dictum, both because it was not necessary to decide that question in order to determine that the Indian Banks were not the alter-egos of New Central in the Georgia and Delaware actions and because there was no discussion of the facts or law related to the holder in due course status of the Indian Banks in the papers before him. (Subsequently, Mr. Justice Gustav G. Rosenberg ruled against CTI's illegality contentions.)

CTI appealed the order entered upon the decisions of Justices Sarafite and Rosenberg to the Appellate Division of the New York State Supreme Court for the First Judicial Department, the New York intermediate appellate court. Significantly, under New York practice (§5501(c) of the New York Civil Practice Law and Rules) the Appellate Division reviews both questions of law and fact. The Appellate Division entered a per curiam decision modifying the order below to eliminate any restriction on the Georgia action and otherwise affirming the lower court order. (The decision is reported at 30 A.D.2d 513, 290 N.Y.S.2d 108.) With respect to the alter-ego issue, it made no comment except to say "that defendant's action were fully consistent with an intention to preserve its right to arbitrate" and, hence, New Central "has not waived its rights under this arbitration clause." In no sense can this be considered a finding on the issue of holder in due course.

CTI then appealed to the highest court in the State, the Court of Appeals, and New Central cross-appealed on the issue of the modification. That court handed down an opinion, written by Judge Adrian P. Burke, affirming the

opinion of the Appellate Division in all particulars (this opinion is reported at 25 N.Y. 2d 49, 250 N.E. 2d 52, 302 N.Y.S. 2d 557). Judge Burke stated with respect to the alter-ego argument:

> "The argument is made at the outset that the defendant is precluded from asserting its rights to arbitration because of its alleged involvement in prior litigations against the plaintiff in other jurisdictions through various 'alter egos.' Specific reference is made to prior proceedings conducted in the Georgia and Delaware State courts. Both actions were attachment proceedings, brought by two Indian banks against quantities of jute backing located in the respective jurisdictions. In each case, the bank asserted its status as holder in due course of a draft received by them from New Central. The status of 'alter ego' is inferred by plaintiff from the participation of the defendant's attorney as an adviser to these foreign banks in the attachment proceedings. Without additional evidence to support it, this claim must be dismissed as meritless. As Justice Sarafite observed, after setting forth the exact nature of these proceedings, 'It strains credulity to conclude, as plaintiff urges, that these other parties are defendant's "alter egos acting at [its] instigation and command."' "

Specifically, Judge Burke did not consider the issue of the holder in due course status of the Indian Banks but restricted himself to a finding that CTI had not met its burden of proof to demonstrate that the Indian Banks were the alter-egos of New Central in the Georgia and Delaware actions. Despite this, the district court held the New York decisions acted as a collateral estoppel against CTI on the issue of the holder in due course status of the Indian Banks. Accordingly it granted summary judgment to the Indian Banks based solely upon the New York proceedings with-

out CTI having an opportunity to have any pre-trial discovery whatsoever. Petitioner appealed from this and other determinations of the district court to the United States Court of Appeals for the Fifth Circuit. That court remanded the case to the district court to determine whether the banks had in fact possession of the instruments sued upon. If they had such possession, the district court was directed to award them summary judgment. Judge Ainsworth dissented from this determination on the grounds that the issues in the federal action were not fully and fairly litigated in the New York State action. Petitioner petitioned for a reargument en banc and this was denied, Judge Ainsworth again dissenting.

Jurisdiction of the District Court

The United States District Court for the Southern District of Georgia had jurisdiction over this action by virtue of 28 USC §1335 as an action in interpleader involving more than $500 in which two or more adverse claimants of diverse citizenship claimed an interest in moneys or property.

Reasons for Granting This Writ

1. The Fifth Circuit has applied the doctrine of collateral estoppel contrary to the requirements previously set forth by this Court.
2. The decision of the Fifth Circuit is at variance with the procedural rules applicable both in federal courts and New York State courts with respect to fundamental rights afforded litigants, and hence denied petitioner due process of law.
3. This case raises major issues concerning collateral estoppel not previously determined by this Court.

This case will probably be this Court's first opportunity to reexamine the circumstances under which the doctrine of collateral estoppel can be applied by a federal court since the decision of this court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 28 L. ed.2d 788 (1971). The *Blonder-Tongue* case removed the requirement of mutuality of estoppel in federal courts at least with respect to patent litigation. It clearly envisioned the demise of mutuality of estoppel in other litigations involving federal issues. As that opinion pointed out, the doctrine of mutuality of estoppel is coming into increasing disfavor with both federal and state courts. In its stead, *Blonder-Tongue* and other decisions substituted a requirement based on fairness. We submit as we will detail below that the decision below is contrary to the standards laid down by the Court in *Blonder-Tongue*. In any event it presents this Court with an opportunity to clarify the circumstances under which collateral estoppel can be fairly applied.

Further here a unique combination of circumstances have resulted in what Judge Ainsworth has described as "a classic case of the granting of a judgment against the litigant without due process of law."

Here a summary disposition of an application for arbitration in the New York courts, in which CTI had the burden of establishing an affirmative defense to the arbitration agreement, is being used to give other parties summary judgment in a dispute in which they have the burden of proof. Furthermore, by the use of the New York State adjudication in federal court in Georgia, CTI is being deprived of its right as a litigant, both under New York procedure and federal procedure, with respect to discovery rights and its rights to a trial of the factual issues.

Thus, both under Article 31 of the New York Civil Practice Law & Rules and Rules 26 through 37 of the Federal Rules of Civil Procedure, a litigant is allowed broad rights of discovery by a variety of discovery devices. Because of the summary nature of the New York adjudication, CTI never had an opportunity to exercise its New York rights of discovery. Yet, as Judge Ainsworth pointed out, the adjudication in New York without the benefit of any discovery proceeding has been used to cut off CTI's pending attempts in Georgia to utilize the federal discovery procedures. Similarly, both Rule 3212 of the New York Civil Practice Law & Rules and Rule 56 of the Federal Rules of Civil Procedure provide definite limitations on the granting of summary judgment. Under neither rule can summary judgment be granted solely upon the affidavit of a lawyer who does not even claim to have knowledge of the facts. Yet precisely such a lawyer's affidavit was used to award summary judgment in federal court simply because it previously had been relied upon by the New York courts not to grant summary judgment but rather to direct arbitration of a case before them.

The deficiencies of the New York judgment to act as collateral estoppel were well summarized by Judge Ainsworth when he stated:

> "It is conceded in the majority opinion by citation of *The Evergreens* v. *Nunan,* 2 Cir., 1944, 141 F.2d 927, cert. denied, 323 U.S. 720, 65 S.Ct. 49, that we are free to go beyond the judgment roll to ascertain what facts have been conclusively established in the prior action. When we do so, we find that there was no actual litigation in New York of the issue of the Banks being holders in due course, that the Banks were not parties to the proceedings, that the context of the New York case was whether arbitration should be ordered as

between CTI and New Central, that the statement of Justice Sarafite that the Banks were holders in due course of the trade acceptances was pure dictum and was supported solely by an affidavit of New Central's counsel (not on personal knowledge), and that the highest New York Court in finally deciding the case did not determine whether the Banks were holders in due course and did not pass on this issue."

The abuse of collateral estoppel to destroy procedural safeguards of litigants was cautioned against by this Court in *Blonder-Tongue* when it stated:

> "The cases and authorities discussed above connect erosion of the mutuality requirement to the goal of limiting relitigation of issues *where that can be achieved without compromising fairness in particular cases.*" * * * "The broader question is whether it is any longer tenable to afford a litigant more than *one full and fair opportunity* for judicial resolution of the same issue." * * * "Although neither judges, the parties, nor the adversary system perform perfectly in all cases, *the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.*" (Emphasis added)
>
> " * * * Also, the authorities have been more willing to permit a defendant in a second suit to invoke an estoppel against a plaintiff who lost on the same claim in an earlier suit than they have been to allow a plaintiff in the second suit to use offensively a judgment obtained by a different plaintiff in a prior suit against the same defendant."

The Fifth Circuit itself realized this in its decision in *Rachal* v. *Hill*, 435 F.2d 59 (5th Cir. 1970) when it refused to allow an adjudication of violation of securities acts in

an equity proceeding for an injunction to act as a collateral estoppel in a suit at law for damages brought by parties allegedly injured by the violations. The court pointed out that such use of the doctrine of collateral estoppel would bring about the unfair result of a defendant being deprived of its right to a jury trial. Here, the invocation of collateral estoppel shifts the burden of proof, destroys CTI's discovery rights and removes the safeguards against unauthorized grant of summary judgment. Thus here too a fundamental unfair results from the doctrine.

We therefore submit that this Court should grant the petition so as to clarify that the collateral estoppel doctrine cannot be used to unfairly deprive litigants of their right to trial.

THE PETITION

For all the reasons stated herein, petitioner submits that this Court should issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review its determination herein.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29464

JAMES TALCOTT, INC.,
Plaintiff-Appellee,

versus

ALLAHABAD BANK, LTD., BANK OF BARODA, LTD., BANK OF TOKYO,
Defendants-Appellees,

and

CITY TRADE & INDUSTRIES, LTD.,
Defendant-Third Party Plaintiff-Appellant,

versus

NEW CENTRAL JUTE MILLS COMPANY, LTD.,
Third Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

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(May 5, 1971)

Before THORNBERRY, GOLDBERG and AINSWORTH, Circuit Judges.

TALCOTT, INC. v. ALLAHABAD BK., LTD.

THORNBERRY, Circuit Judge: In this multiparty, multi-issue, multisuit litigation,[1] CTI appeals from adverse judgments below[2] awarding the contested fund in interpleader to the Indian Banks, quashing service of process against the New Central Jute Mills, and dismissing its counterclaim against James Talcott, Inc. On account of the complex nature of the proceedings, we shall take up CTI's claims against each of the three appellees separately. First, however, because a full understanding of this controversy and the results we reach is impossible without knowledge of what has transpired to date, we present the factual and procedural history of this litigation.

I.

FACTS AND PROCEDURAL HISTORY

A. RELATIONSHIP OF THE PARTIES

City Trade & Industries, Ltd., a New York corporation [CTI], the appellant herein and a defendant-third party plaintiff below, entered an agreement in 1959 with New Central Jute Mills, a concern in India, which produces jute backing for rugs and carpets. By the terms of the agreement, CTI was appointed New Central's exclusive distributor for the sale of jute backing in the United States for a period extending to March 31, 1964. CTI alleges that under this agreement financing between itself and New Central

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[1] All told, six suits have been filed in connection with this controversy.

[2] *James Talcott, Inc. v. Allahabad Bank, Ltd.*, S.D. Ga. 1969, 310 F. Supp. 6.

was arranged especially for New Central's convenience to enable New Central to comply with the laws of India.

According to CTI, the laws of India prohibited New Central from exporting jute to the United States unless there existed in the United States a purchaser who had paid or promised to pay for the goods in United States dollars. Further, CTI claims that New Central was required by the laws of India

> to engage in the export of jute only with the permission [of] the Reserve Bank of India [which, incidentally, CTI identifies with the Banks in the instant action, since, according to CTI, the Banks herein are members of the Reserve Bank].

CTI then charges that

> [s]uch permission was obtained from the Reserve Bank by New Central with respect to each and every shipment of jute by New Central to CTI during the years 1959 through 1964. The permission thus granted by the Reserve Bank to New Central required that New Central's shipments of jute would be paid for by CTI within 180 days in United States dollars, and in representing the transactions to the Reserve Bank, New Central formerly [sic] characterized CTI as a purchaser of New Central's jute. In point of fact, however, the Reserve Bank has full knowledge of the

> relationship between New Central and CTI as that of principal and exclusive distributor and selling agent for New Central. . . .

Consequently, CTI alleges, it made payments for jute exported to the United States to meet sales commitments it had made in New Central's behalf, as if it, CTI, were the purchaser. For the purpose of making these payments, CTI established irrevocable letters of credit in favor of New Central for ninety-five percent of the cost of freight port of distribution price. For the remaining 5% of the cost and freight price, New Central drew sight drafts upon CTI payable within 90 days. As a general rule, the source of payment of the drafts at maturity was the proceeds of the sale of jute by CTI in the United States. Occasionally, however, New Central exported jute to the United States when no actual sale of the jute had been made. When this occurred, the jute would be delivered to the account of CTI as buyer and stored until market conditions were favorable to a sale. In these instances, the invoice was accompanied by a draft drawn by New Central on CTI, which CTI would accept in exchange for the documents of title to the jute. Generally, the drafts were payable within ninety days. If CTI had not managed to sell the jute within the ninety day period, CTI would require outside funds to pay the outstanding drafts. CTI would then turn to James Talcott, Inc., a factor, and the plaintiff-appellee herein, who would advance the needed funds in exchange for a first security interest in quantities of jute.

The relationship between New Central and CTI proceeded on the basis described above until 1964, when the 1959 agreement expired. The parties attempted, but failed, to negotiate a new contract; and so in 1964 they ceased doing business together. At this time there was allegedly over $900,000.00 in drafts outstanding against CTI, and inventory in CTI's possession representing payments by CTI to New Central allegedly approximating $3,500,000.00. CTI contends that New Central agreed to take over this inventory against payment to CTI of the cost plus expense incurred by CTI in holding the goods, and that in exchange CTI would pay the outstanding drafts of $900,000. According to CTI, however, New Central never paid the stated amount and CTI therefore sold certain of the jute over which it had control and reduced the claimed debt owing to approximately $1,500,000.

B. PREVIOUS LITIGATION.

At this point, the Indian Banks, to whom New Central had negotiated the drafts, filed a suit of attachment against the remaining jute in Chatham County Superior Court, in the State of Georgia. The Banks were suing as purported holders of CTI's outstanding drafts, claiming that CTI was indebted on those drafts and was selling the property liable for the payment of the drafts to avoid payment of its debt. *City Trade & Industries v. Allahabad Bank, Ltd., et al*, 114 Ga. App. 12, 150 S.E.2d 182 (1966).

During the pendency of these attachment proceedings, the price of jute skyrocketed, so all the parties agreed to release the jute for sale to the order of James Talcott, Inc. Talcott was then to hold the fund derived from the proceeds, allegedly as a neutral stakeholder, awaiting a resolution of the various conflicting claims to the money.

Shortly after the sale of the jute, CTI instituted a separate proceeding in New York, in June 1965, against New Central for an accounting on their 1964 agreement. The suit, however, was not prosecuted by either party for two years, for reasons not entirely clear from the record, but apparently at the agreement and convenience of both parties.

Meanwhile, back in Georgia, the Indian Banks, on February 7, 1966, instituted garnishment proceedings in the Georgia courts against Talcott, who was holding the contested fund. And, not to be outdone, CTI sued Talcott on April 12, 1966, in the Supreme Court of the State of New York, claiming the sole right to the proceeds of the jute sale held by Talcott. Thus besieged, Talcott in October 1966 instituted this statutory interpleader action[3] in federal district court in Georgia.

As a result of Talcott's filing of the statutory interpleader action, and pursuant to the district court's authority to enjoin other proceedings in state or federal court affecting the property involved in the in-

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[3] *See* 28 U.S.C. § 1335.

terpleader action,[4] the Indian Banks and CTI were restrained from further prosecuting their Georgia and New York suits against Talcott. The filing of the interpleader action, however, apparently revived CTI's interest in its New York suit for an accounting against New Central, and the prosecution of that previously dormant suit was renewed in 1967. Thus, while the instant suit was proceeding to its conclusion in Georgia, CTI's suit against New Central was also progressing separately in New York.

Since what happened in the New York courts in effect controlled the outcome of the suit below between CTI and the Indian Banks on the issue of collateral estoppel, we will describe the New York proceeding in more detail later in this opinion when we take up that issue. At this point, it is sufficient to say merely that the New York suit was an action for accounting by CTI against New Central under their

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[4]See 28 U.S.C. § 2361, which provides as follows:

> In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.
>
> Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment....

original 1959 contract; that New Central defended by filing a motion to stay the suit until CTI carried out its obligations under a certain clause of their contract, which New Central contended required arbitration;[5] that CTI then responded, arguing among other things not relevant here, that New Central had waived its right under the contract to demand arbitration by instigating, through the Indian Banks as "alter egos" or "fronts," the attachment proceedings against CTI in Georgia. The trial court in New York, the Appellate Division, and the New York Court of Appeals each rejected CTI's "alter ego" contention flatly. *City Trade & Industries, Ltd. v. New Central Jute Mills Co.*, 25 N.Y.2d 49, 250 N.E.2d 52, 302 N.Y.S.2d 557 (1969).

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[5]The pertinent clause claimed to require arbitration provides as follows:

> That in the event of any dispute or difference arising between the parties hereto in respect to this agreement, unless resolved amicably, the same shall be referred by either party for arbitration in India to the arbitration panel of the Federation of Indian Chambers of Commerce & Industry, New Delhi; or Indian Chamber of Commerce, Calcutta; or Bengal Chamber of Commerce & Industry, Calcutta; whichever of these three is chosen by CTI in their discretion, but that in the event of notification for such arbitration by NEW CENTRAL, CTI shall signify their choice within one month, and in case of no advice of choice by CTI, NEW CENTRAL would be free to refer to any of the bodies aforesaid. Arbitration award of the aforesaid would be fully binding on both the parties, and the provisions of the Indian Arbitration Act shall apply. In any such event, cost of CTI's representative's flying to India and his staying expense in India, up to a mixímum [sic] of Rs. 10,000/, would be added to the cost of arbitration and would be borne or paid by the party or parties hereto as awarded.

I.

CTI V. INDIAN BANKS

A. PROCEEDINGS IN THE COURT BELOW

In the instant interpleader action, the Indian Banks asserted that they were entitled to the entire fund placed in the registry of the court by virtue of their status as holders in due course of the notes secured by the fund. CTI answered that the Indian Banks were not holders in due course because they were acting merely as "alter egos" for New Central, and therefore were subject to all defenses existing between CTI and New Central. The Indian Banks then moved for summary judgment, setting up the judgment in the New York proceeding between CTI and New Central as a bar to relitigation of the "alter ego" issue in the subsequent proceeding. The district court undertook a careful examination of the pleadings and issues in the New York proceeding and concluded that the identical issue which CTI sought to raise in the instant action "had been raised and pursued to a conclusion at the behest of CTI" in New York, and that "the New York courts held against CTI" on the point. 310 F. Supp. at 13. Thus, the district court concluded, since CTI could not relitigate its sole basis for opposition to the Indian Banks' claim, there was no material issue of fact in the case and summary judgment must be granted.

B. SUMMARY JUDGMENT

At the outset, we are mindful that our duty in this case is to review the judgment of the district court

under the very strict standard applicable to appellate review of summary judgment — that is, to determine whether there exists any genuine issue of material fact underlying this adjudication. Moore's *Federal Practice* ¶ 56.27[1]. Throughout, we bear in mind that the party moving for summary judgment — the Indian Banks — had the burden of clearly establishing the lack of a triable issue of fact upon a record that is adequate to the legal issue presented; and that the moving party's papers are to be carefully scrutinized. At the same time, we note that this case involves a type of action, the very nature of which may lend itself to the summary judgment procedure. For the rights of a holder in due course of a negotiable instrument properly asserted, may cut off defenses that would raise factual issues and prevent summary judgment. *United States v. McCulloch*, E.D.N.Y. 1939, 26 F. Supp. 7. Likewise, as a general rule, actions involving affirmative defenses such as collateral estoppel, may be more amenable to a summary adjudication than others. Moore's *Federal Practice* ¶ 56.15 [8].

With these broad guidelines in mind, we turn to a consideration whether there is any genuine issue of material fact underlying the adjudication below. Our analysis of the issues is dictated by the procedural structure of an action on a negotiable instrument brought by a purported holder in due course.

C. PRODUCTION OF THE INSTRUMENTS

In a suit on negotiable instruments, the burden is initially on the party suing on the instruments to show

first that he is a *holder* of the instruments sued on. UCC § 3-302; Hawkland, *Cases on Commercial Paper and Bank Deposits and Collections* 183 (1967). A "holder" is "a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." UCC § 1-201(20). The most obvious way for a holder to establish that he is a holder of instruments sued on, of course, is to produce the instruments in evidence.[6] In the instant case, however, the Indian Banks *at no time* produced the contested instruments in the court below. Instead, the Banks in their original interpleader answer stated that *copies* of the instruments were attached to and made a part of the attachment proceedings [discussed above] filed in the Superior Court of Chatham County, Georgia. CTI's pleadings and affidavits filed in response to the Banks' reference to these copies attached to the pleadings in the Georgia suit are ambiguous at best. Nowhere, for example, did CTI assert that the copies were not verified or true copies of the trade acceptances. In addition, in its pleadings CTI never actually denied that the Banks were in possession of the trade acceptances, and it several times referred to the instruments as "the trade acceptances or bills of exchange held by the [defendant Banks]."

Nevertheless, CTI did raise some questions concerning the whereabouts of the instruments and the

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[6] UCC § 3-307(2) provides that

> [w]hen signatures are admitted or established, *production of the instrument* entitles a holder to recover on it unless the defendant establishes a defense. (Emphasis added)

Banks' control of them. For example, in one affidavit counsel for CTI stated on information and belief that the instruments were "owned and controlled by New Central, notwithstanding the same are alleged to be held by [defendant Banks]." CTI also raised questions in its interrogatories with respect to the location of the trade acceptances and at one point asserted that the trade acceptances are not genuine. While the issue of the Banks' possession of the instruments perhaps was inartistically delineated by CTI, we think CTI's pleadings, affidavits and interrogatories are sufficient to raise a question whether the Banks actually were in possession of the instruments. We are not, after all, analyzing CTI's papers opposing summary judgment under a discriminating lens; on the contrary, the law requires that the papers of a party opposing summary judgment are to be "treated indulgently." *Bohn Aluminium & Brass Corp. v. Storm King Corp.*, 6th Cir. 1962, 303 F.2d 425. The movant's papers, on the other hand, are to be closely scrutinized. Moore's *Federal Practice* ¶ 56.15[3]. It is the movant's burden to exclude any real doubt as to the existence of any genuine issue of material fact. *National Screen Service Corp. v. Poster Exchange*, 5th Cir. 1962, 305 F.2d 647. And it is the movant Banks' failure to carry this burden that convinces us that summary judgment on the issue of possession must be reversed. See *Adickes v. S. H. Kress and Co.*, 90 S.Ct. 1598 (1970). For in the instant case there is a real doubt in our minds as to the Banks' possession of these instruments, created by the Banks' own failure to produce the instruments in support of their motion for summary judgment. The Banks urge us to rely

on the copies affixed to the Georgia attachment proceedings. But nowhere is there proof that these were true copies of the trade acceptances, and even those copies were never produced in the court below. The Banks assert in a supplemental memorandum presented to this Court on request that "they were (and still are) in actual possession of the trade acceptances." Thus, they seem to suggest, it would be wasteful to remand this case for a full-fledged determination on this simple issue of possession, when we could determine here and now that they do possess the instruments. But the simple truth is that on the Record we have before us, we are incapable of concluding beyond a doubt that the Banks are "holders." That the issue of actual possession is a simple one to prove should not mislead us into underestimating the significance of the issue. In a suit on a negotiable instrument, possession is in a very real sense "nine-tenths of the law." Possession establishes a prima facie case of ownership. *Leathers v. Turner*, 75 Ga. App. 62, 41 S.E.2d 921 (1947). And proof of possession by production of the instrument entitles the holder to recover on it unless the opposing party establishes a defense. U.C.C. § 3-307(2). *Cf. Pitello v. Demetry*, 112 Ga. App. 643, 145 S.E.2d 792 (1965). On the other hand, if the Banks cannot produce the instruments, they will lose the benefit of the presumption of ownership, and the case might very well be determined on that issue. It is thus essential that summary judgment on the issue of possession be reversed and the case be remanded for a full-fledged determination of that issue.

D. COLLATERAL ESTOPPEL

If the Banks are able to produce the instruments in suit on remand the question will then arise whether CTI can lawfully raise its "alter ego" defense to the Banks' holder in due course status, or is precluded from raising the defense by the collateral estoppel effect of the New York judgment. Because of the possibility that the parties will reach this issue on remand, we deem it necessary to decide the issue now. As we stated earlier, the district court awarded summary judgment on the holder in due course issue because CTI was precluded from raising its defense by collateral estoppel. This ruling comports with the principle that production of an instrument entitles a holder to recover on the instrument unless the defendant establishes a defense, and that the burden of proving that one is a holder in due course does not shift to the holder until is is shown that a defense exists. U.C.C. § 3-307(2), (3). Summary judgment was therefore clearly correct if the Banks' collateral estoppel defense was good, for the genuine issues of fact that CTI sought to raise would have been foreclosed. On the other hand, it is clear that summary judgment was incorrect if the Banks' collateral estoppel defense was not good. Our task is therefore limited to considering whether collateral estoppel should have been applied.

The traditional threshold requirements for application of the doctrine of collateral estoppel are that (1) the issue to be concluded must be identical to that involved in the prior action; (2) in the prior action the

issue must have been "actually litigated"; and (3) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *See* Restatement of Judgments § 68 (1942), Moore's *Federal Practice* ¶ 0.443[1]; Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 4-5 (1942). If any one of these requirements is lacking, there is no collateral estoppel.

After a careful examination of the pleadings and opinions in the New York action,[7] we have concluded that the "alter ego" issue in New York as litigated and adjudicated was identical to the "alter ego" issue in the interpleader action below. CTI's "alter ego" argument consists of a number of ostensibly separate, but actually overlapping charges made by CTI in New York to support its contention that the Banks were suing CTI in Georgia as "fronts" for New Central; and in the instant interpleader action to support its contention that the Banks are not holders in due course. Point for point, and almost word for word, CTI made the same charges in New York with respect to New Central's relationship with the Banks that it made below. Specifically, CTI charged both in New York and below that the Banks were "alter egos" of New Central because (1) the trade acceptances had been

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[7] It is established that in discovering what issues were determined by the judgment in a prior action, the court in the second action is free to go beyond the judgment roll and may examine the pleadings and the evidence in the prior action. *The Evergreens v. Nunan*, 2d Cir. 1944, 141 F.2d 927, *cert. denied*, 323 U.S. 720, 65 S.Ct. 49.

paid by New Central directly to the Banks [Appendix p. 17 and p. 373]; (2) the Banks were acting as collecting agents for New Central in the Georgia action [Appendix pp. 17, 21 and p. 382]; (3) the Banks had actual knowledge that CTI was New Central's exclusive distributor and selling agent and not a purchaser [Appendix pp. 45-47 and pp. 364-367]; (4) the trade acceptances were owned and controlled by New Central [Appendix p. 51 and p. 375]; and (5) New Central was the real party in interest in the Georgia actions, while the Banks were acting only as straw plaintiffs for New Central [Appendix p. 61 and p. 380].

CTI seems to argue that the issues were not identical, however, since a finding that the Banks were not New Central's alter-egos for the purpose of bringing the Georgia attachment suits does not mean that they would not be "alter-egos" for other purposes not connected with the attachment suits. That different legal conclusions may flow from a single fact finding, however, does not alter the existence of that fact finding. The distinguishing feature of the doctrine of collateral estoppel is that it precludes in a second or subsequent suit the relitigation of fact issues actually determined in a prior suit *regardless of whether the prior determination was based on the same cause of action* in the second suit. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326, 75 S.Ct. 865, 867 (1955), *Seguros Tepeyac, S.A., Compania Mexicana v. Jernigan*, 5th Cir. 1969, 410 F.2d 718, 726, *cert. denied*, 396 U.S. 905, 90 S. Ct. 219. We cannot accept, therefore, CTI's suggestion that a fact issue determined in one suit loses its validity in a subsequent suit involving a different cause of action

simply because that fact determination is proffered to support a different legal theory.[8]

Having determined that the "alter ego" issues in each case were identical, we turn to a consideration whether they were "actually litigated" in the prior action. As a general rule, where a question of fact is put in issue by the pleadings, and is submitted to the jury or other trier of facts for its determination, and is determined, that question of fact has been "actually litigated." Restatement of Judgments § 68, comment (c) (1942).

There is no question that CTI's "alter ego" contention was put in issue in the New York proceedings. CTI clearly urged the "alter ego" contention as grounds for avoiding the arbitration provision of its contract with New Central and New Central clearly denied that any such "alter ego" relationship existed. Moreover, the issue was clearly adjudicated by the New York courts. The trial court ruled expressly on the alter ego issue, as did the Appellate Division and the Court of Appeals. Although the New York courts made no express findings of fact on each charge made by CTI in support of its "alter ego" contention, it is a necessary inference that the New York court determined that there was no

[8]There are circumstances when the same historical factual circumstance may be involved in two actions, but the legal significance of the fact differs in the two actions because different legal standards are simultaneously applicable to it. *See, e.g., Capps v. Whitson,* 157 Va. 46, 160 SE 71 (1931). This is a very narrow exception to the rule with respect to identity of issues, however, and is applicable only when there is a demonstrable difference in the legal standards by which the facts are evaluated. *See* Moore's *Federal Practice* ¶0.443[2].

merit to any of the charges since CTI would have prevailed in the matter it was urging on the New York courts if the New York courts had accepted as true any of CTI's contentions. Moore's *Federal Practice* ¶ 0.443[4]. This was the conclusion of the court below, and with that conclusion we agree. Concomitantly, the fact that judgment in the New York action could not have been rendered in New Central's favor unless all of CTI's contentions with respect to the Banks' relationship with New Central had been rejected establishes that the New York courts' decision of the "alter ego" issue was necessary to the judgment, which is the last of the traditional threshold prerequisites to application of the doctrine of collateral estoppel. Restatement of Judgments § 68, Comment (m) (1942).

CTI seems to argue nevertheless that the New York courts' holding was unnecessary to the judgment for another reason. CTI seizes upon certain language of the Supreme Court of New York County, which stated that "the actions instituted in [Georgia and Delaware] were brought by banks *who were holders in due course of the drafts* executed by plaintiff"; and other language in the opinion of the Court of Appeals, which stated with reference to the Georgia and Delaware actions, that "[i]n each case, the bank *asserted its status as holder in due course* of a draft received by them." (Emphasis added) CTI then argues that these statements were unnecessary to the decisions in the New York courts and that any reference to the Banks as holders in due course by the New York court was mere dictum. Therefore, CTI argues, the court below erred in holding "the New York decision to act as a collateral estoppel against CTI on the issue of holder in due course

status of the Indian Banks." We agree with CTI that the New York courts' reference to the Banks as "holders in due course" were unnecessary to their decisions. But we disagree with CTI's assertion that it was the "holder in due course issue" which the court below held to be collaterally estopped by the New York judgments. It is quite clear, and CTI states this in its own brief, that the only finding the New York courts made was that "CTI had not met its burden of proof to demonstrate that the Indian Banks were the alter egos of New Central in the Georgia and Delaware actions." [Appellants' Brief at 18]. And this very same "alter ego" issue is the issue which the court below concluded was foreclosed by the New York judgments. The court below did not hold that CTI was estopped on the issue of holder in due course because it never *reached* the issue of holder in due course. As long as CTI was estopped from raising its "alter ego" defense — which was the only defense it raised — the Banks could recover merely by producing the instruments.

We are therefore in complete agreement with the court below that the traditional prerequisites to collateral estoppel have been satisfied in this case: The "alter ego" issue sought to be relitigated by CTI was identical to the "alter ego" issue raised in the New York courts; the issue was "actually litigated" in New York; and the New York courts' determination of the issue was necessary to their decisions.

There has been until recently, however, another traditional prerequisite to application of the doctrine of collateral estoppel — the "mutuality" requirement, which prevents a litigant from invoking the conclusive

effect of a judgment unless he was a party or in privity with a party to the suit in which the prior judgment was rendered. But since the landmark case of *Bernhard v. Bank of America Nat'l. Sav. & Trust Ass'n*, 19 Cal.2d 807, 122 P.2d 892 (1942), this "doctrine of mutuality" has been steadily eroded. *See, e.g.*, Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281 (1957); Currie, *The Contributions of Roger J. Traynor — Civil Procedure: The Tempest Brews*, 53 Calif. L. Rev. 26 (1965). The most recent case in this Circuit discussing the trend away from the doctrine of mutuality is *Rachal v. Hill*, 5th Cir. 1970, ____ F.2d ____, [No. 29585, slip opinion dated December 3, 1970]. *See also Seguros Tepeyac, S.A., Compania Mexicana v. Jernigan*, 5th Cir. 1969, 410 F.2d 718, *cert. denied*, 396 U.S. 905, 90 S.Ct. 219. The main reason advanced for abandoning the doctrine of mutuality has been that "no satisfactory rationalization" exists for adhering to the doctrine. *See Bernhard v. Bank of America*, 19 Cal. 2d at 812, 122 P.2d at 894-95. *But see* Moore's *Federal Practice* ¶ 0.412 [1].

Thus, it has been argued, if a party has had his day in court with a full and fair opportunity to litigate his issue, why should he be permitted a second opportunity to litigate the same issue in a subsequent suit simply because he has a different adversary? A growing number of courts have been persuaded by this argument and have abandoned the doctrine. Included in the roster of nonmutuality jurisdictions is New York, whose law we must apply on this issue of collateral estoppel.[9]

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[9]Under the applicable conflicts of law principle in interpleader actions, a federal court applies the choice of law rules of the

In a series of opinions, the New York courts have abandoned mutuality in favor of a test calling for application of collateral estoppel whenever the party against whom the prior judgment is asserted has had a "full and fair opportunity" to litigate the issue in the prior suit. *Schwartz v. Bronx City Public Administrator*, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725 (1969); *B. R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); *Cummings v. Dresher*, 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 974 (1966); *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956). *See also, Note, Collateral Estoppel: The Demise of Mutuality*, 52 Cornell L. Quar. 724 (1967). This standard obviously necessitates a case-by-case approach to application of the doctrine, but certain indicia of fairness may be relied upon to determine whether the doctrine should be applied in any particular case, without having to evaulate the prior judgment on its merits. According to the commentators, the most dependable indicator of fairness is the posture in the prior suit of the party against whom collateral estoppel is urged. If that party lacked the initiative in the previous suit, any number of considerations may have hampered his opportunity to litigate. For instance, if in the prior action the party

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state in which it is sitting. *Griffin v. McCoach*, 314 U.S. 498, 61 S.Ct. 1023 (1941); Moore's *Federal Practice* ¶ 22.14[5]. Thus we look to Georgia choice of law rules to determine what law to follow on the question of mutuality. Since we have been unable to find a Georgia case precisely in point on this question, we conclude that Georgia follows the general rule that the law of the state where the judgment in question was rendered determines the question of mutuality. Restatement, Conflict of Laws § 450, comment (d). *See Behrens v. Skelly*, 3d Cir. 1949, 173 F.2d 715, *cert. denied*, 388 U.S. 821, 20 S.Ct. 66.

was defending against a relatively small claim, he may not have been motivated to litigate as vigorously as possible and it could be thought unfair in subsequent litigation when much more may be at stake to hold him to the prior adverse judgment. *E.g. Berner v. British Commonwealth Pac. Airlines Ltd.*, 2d Cir. 1965, 346 F.2d 532, 540, *cert. denied*, 382 U.S. 983, 86 S.Ct. 559 (1966). It also may be thought unfair to bind a party to a judgment rendered in a forum which he had no opportunity to choose or change. *Cf. Zdanok v. Glidden Co.*, 2d Cir. 1964, 327 F.2d 944, 956, *cert. denied*, 377 U.S. 934, 84 S.Ct. 1338 (1964). Thus, when the party against whom the adverse judgment is asserted lacked the initiative in the prior action, the courts are disposed to examine the circumstances under which the prior judgment was rendered to ascertain the fullness and fairness of his previous opportunity to litigate. If they determine that his inability to choose a forum had no prejudicial effect, that he had a pressing motive to litigate fully, that there was extensive litigation of the issues, the prior judgment will be given effect regardless of his defensive position in the prior suit. If the party against whom the prior judgment is asserted did have the initiative in the prior suit, however, in the sense that he instigated the suit, there would appear to be *no reason* to assume that he did not have a full and fair opportunity to litigate. Thus, there is no reason to assume that he lacked sufficient *motive* to litigate when it was he himself who commenced the litigation. Similarly, it would be anomalous to consider the fairness of his forum when it was he himself who chose the forum. In short, a party who instigated the prior suit is in a poor position to complain about the adequacy of his *opportunity* to litigate in that suit.

It was this consideration of CTI's posture in the New York proceedings that seemed greatly to influence the court below. For the court made a point of the fact that the suit was instigated in New York at CTI's behest; that *CTI* enjoyed the privilege of choosing a forum and the position of taking the offensive; and that CTI prosecuted the issue fully on appeal from the trial court to both the Appellate Division and the New York Court of Appeals. Moreover, the court below noted, and we note on this appeal, that CTI nowhere complained that it was in any way inhibited from making additional proof on the issue in New York.[10] The simple truth is that CTI chose to prosecute the claim in New York and failed to convince the New York courts that there was any merit to its case. It is fundamental that "[i]f an issue is raised and the party who has the burden fails in his proof and the issue is decided against him, he is just as much bound by collateral estoppel as though he had presented a barrel of testimony." *See also United States v. Silliman*, 3d Cir., 167 F.2d 607, 617, *cert. denied*, 335 U.S. 825, 69 S.Ct. 48 (1948); *Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 101, 74 S.Ct. 414 (1954).

There is another reason why we see no unfairness in applying the doctrine of collateral estoppel in this case. Much of the seeming unfairness of the doctrine stems from its availability in *any* subsequent suit where the identical issue is raised, regardless of how un-

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[10]It has been suggested that the burden should be on the party against whom the judgment is asserted to raise the issue and to affirmatively show that he did not have a full opportunity to litigate. *See Thames, Mutuality in Collateral Estoppel: Never the Twin Should Meet*, 37 Miss. L.J. 244, 253 & n.25 (1966).

foreseeable the action may be, and notwithstanding that an entirely different cause of action may be involved. It is this potential for remote application that has given the doctrine of collateral estoppel a bad reputation and that has prompted the remark that collateral estoppel is "an extremely dangerous instrument." Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 28, 289 (1957); Moore's *Federal Practice* ¶ 0.441. *See also The Evergreen v. Nunan*, 2d Cir. 1944, 141 F.2d 927.

In the instant case, however, not only was the subsequent suit in which the alter ego issue was raised "reasonably foreseeable," but the suit was actually being tried simultaneously with the New York suit.

We are thus persuaded that not only are all the requirements of collateral estoppel fulfilled in this case so that the doctrine is logically applicable, but that application of the doctrine in this case would occasion no unfairness. To be sure, we recognize that whenever a court considers applying the doctrine of collateral estoppel, there is always a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance at producing evidence. Without more, however, this question is not sufficient to outweigh the extremely important policy underlying the doctrine of collateral estoppel — that litigation of issues at some point must come to an end.

To recapitulate our position up to this point, we have concluded that if the Banks can produce these instru-

ments on remand, they will be entitled to recover as holders of the instruments. It will be unnecessary for the Banks to offer any proof that they are holders in due course because the burden of proving holder in due course does not shift to a holder until a defense is raised by the opposing party. In this case, the only defense CTI has sought to raise is its "alter ego" defense, and we have concluded that it is collaterally estopped from raising that issue because (1) CTI raised the claim that the Banks were "alter egos" of New Central in the New York proceedings; (2) the operative facts of the "alter ego" claim in New York were identical to the operative facts of CTI's "alter ego" defense in the instant proceeding; (3) CTI litigated the "alter ego" issue at its own behest all the way through the New York courts; and (4) the New York courts rejected the claim on grounds that CTI had failed to meet its burden of proof on the issue. Thus, since CTI is collaterally estopped from raising its only proferred defense to the Banks' suit on these negotiable instruments, the holder-in-due-course status of the Banks will never be put in issue and the Banks will be able to recover merely by producing the instruments.

E. INTEREST ON THE FUND

The court below, after granting the Banks' motion for summary judgment, ordered the Clerk of the court to pay out to the Banks all the funds deposited in the registry of the court, including the interest that had been earned on the funds while they were held by Talcott, and later while they were on deposit in

interest-bearing accounts in several Georgia banks, awaiting the outcome of this litigation. 310 F. Supp. at 15. CTI argues on this appeal that the Banks are not entitled to interest on their claim because

> they are estopped by conduct to demand interest on the purported trade acceptances in the circumstances in this case because the place of deposit, the time of deposit, and all arrangements regarding the deposits were under the sole control of themselves and Talcott.

CTI cites nothing in the Record that would support this contention. Furthermore, it cites no authority that would explain why this contention, even if it could be substantiated, is relevant. We see no merit whatever to CTI's argument on this point. There is no reason why interest accruing on a contested fund during litigation over the fund should not be awarded to the winner of the fund. We therefore conclude that the district court committed no error in awarding the fund plus accrued interest to the Indian Banks.

III

CTI v. NEW CENTRAL

In addition to the contest between CTI and the Indian Banks below, there was also a controversy between CTI and New Central, engendered by CTI's attempt to bring New Central into the suit by means of a third-party action. CTI's apparent purpose in filing

the third-party action against New Central was to recover over against New Central in the event the Banks recovered to the exclusion of CTI. The third party action was sanctioned by the court below, and in an order dated April 3, 1967, the court authorized service to be made upon New Central. On August 19, 1967, and on three subsequent days, a summons was published in the *Savannah Evening Press*, of Savannah, Georgia, commanding the appearance of New Central pursuant to "Rule 14 and Rule 4(7) (e) (i) (A) (B) (C) (D) (E) (2), USCA, as amended, and Sections 81-204, 205, 207.1 Ga. Code Ann." The Clerk of the Court on August 21, 1967, sent by registered mail a copy of the *Savannah Evening Press* for August 19, 1967, containing the notice to New Central's office at 11 Clive Row, Calcutta, India.

Counsel for New Central, on October 31, 1967, filed an Objection to the Attempted Service of Process and Motion to Quash, on the ground that any service attempted was invalid and unauthorized by statue, law or rule.

The court below on May 8, 1968, entered an order adjudging that service upon New Central was perfected, but that the order should be "without prejudice to the pending Motion of Third Party Defendant to quash and set aside any return of service thereof including service by publication." Ultimately, the matter came to be heard on the motion to quash, and the court entered an order on October 24, 1969, granting the motion to quash and dismissing the third party complaint for failure of service of process.

TALCOTT, INC. v. ALLAHABAD BK., LTD.

CTI appeals from the dismissal of its third-party complaint contending (1) that New Central was before the court; (2) that New Central was properly served; and (3) that New Central had been represented by counsel of its choice at every state [sic] of the proceedings.

In connection with its first contention, CTI states that "a cursory review of the record will disclose that counsel for the Indian Banks filed repeated motions and objections on behalf of New Central prior to its present counsel of record entering an appearance in the case." The "repeated motions and objections" to which CTI refers were two motions by the Banks to dismiss the third-party complaint on grounds that service of process on New Central was not authorized by statute or rule. CTI invites us to infer from these motions filed by the Banks that counsel for the Banks were in fact representing New Central, and thus that New Central was "before the court."

There is obviously no merit whatever to this contention. In the first place, Rule 14, F.R. Civ. P. clearly provides that "[a]ny party may move to strike the third-party claim." Thus, the Banks were acting fully within their rights in opposing the claim, and no inference of deceptive conduct on their part may be drawn from their participation in the case on this point. *See also* Moore's *Federal Practice* ¶ 14.18[2.--2]. In the second place, the Record affirmatively shows that when counsel of record for New Central first appeared in this case, it appeared specially, and without submitting to the jurisdiction of the court, for the

limited purpose of objecting to the attempted service of process on New Central in the third-party action. We therefore reject CTI's contention that New Central was at all times "before the court."

CTI's second contention is that New Central has been properly served and is therefore subject to the jurisdiction of the court. The relevant question we must answer on this point is whether the method by which service was attempted on New Central was authorized by statute or rule.[11] The court below held that it was not.

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[11] In its brief on this point, CTI has made a rather elaborate argument which apparently is based on a misunderstanding of the differences between subject matter jurisdiction and venue and subject matter jurisdiction and personal jurisdiction. CTI's first contention reads substantially as follows:

> In attempting service of process upon New Central, CTI as third party plaintiff contended that the rule [presumably Rule 4, F.R. Civ. P.] did not require an independent jurisdictional basis "because a third party claim" is treated as ancillary for jurisdictional purposes.

The proposition that there need be no independent jurisdictional basis for a third-party claim is, of course, true, C. Wright, *Law of Federal Courts* § 76, at 336 (1970), but it has nothing whatever to do with acquiring in personem jurisdiction by service of process. Ancillary jurisdiction is a concept having to do with the subject matter jurisdiction of the federal courts, Wright, *supra*, at § 9; and it is clear that even though a court has ancillary jurisdiction of a claim, personal jurisdiction over the third party defendant must be secured by proper service of the third party summons. Wright & Miller, *Federal Practice and Procedure: Civil* § 1063 (1969; 1A W. Barron and A. Holtzoff, *Federal Practice and Procedure* § 424, at 660 (Wright ed. 1960).

Next CTI refers this Court to 28 U.S.C.A. § 1391(d), which provides that "[a]n alien may be sued in any district." From this provision, CTI concludes that "if an alien 'may be sued,' it follows that an alien may be served." Section 1391, of course, is a venue statute, and again, it has nothing whatever to do

The attempted method was service by publication. Service by publication on a foreign corporation in actions of this type is authorized by neither federal statute nor rule. According to Rule 4 (d)(7), F.R. Civ. P., however, service may be made on a foreign corporation "if the summons and complaint are served in the manner prescribed by . . . the law of the state in which the district court is held . . ." The Record in this case shows that service was made by publication pursuant to Ga. Code Ann. tit. 81-204, 205, 207-1. The court below held, however, that CTI's third-party action against New Central was in the nature of an action *in personem;* and that, while Georgia statutes have provisions for extra-territorial service in certain cases *in rem* Georgia law does not provide for the service by publication or otherwise upon nonresidents in actions *in personem.* The district court was correct in this conclusion. Georgia courts interpreting the above statutes have consistently held over the years that judgments *in personem* cannot validly be rendered against nonresident defendants where service is had only by publication.[12] *Sternbergh v. McClure*, 217

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with acquiring personal jurisdiction by service of process. Wright & Miller, *supra.* Thus, even though New Central could be sued for venue purposes in any district in the United States, it still had to be properly served with process.

[12]Section 81-204 provides as follows:

81-204. *Service on nonresidents.* — If the defendant in an equitable proceeding shall not reside in the State, service of the petition or any order of the court may be made by publication. If the nonresident defendant shall be represented in court by an attorney at law or in fact service on such attorney shall be sufficient. In all cases not embraced within the foregoing provisions, the judge may prescribe extraordinary service according to the exigencies of each case.

Section 51-205 provides as follows:

81-205. *Service by publication; nonresidents or unknown owners or claimants.* — Where any nonresident or person unknown shall claim or own title to or an interest, present or contingent, in any real or personal property in this State, service on such nonresident or unknown owner or claimant may be made by publication in cases affecting such property where proceedings are brought —

1. To remove a cloud therefrom or quiet title thereto.

2. To cancel or set aside deeds, mortgages, liens, or incumbrances thereon.

3. To establish, force, or foreclose liens thereon.

4. To enforce, by decree for specific performance, any contract in reference thereto.

5. To order the partition thereof by division or sale.

6. To make any decree or order in which the subject of the action is real or personal property in this State, in which a nonresident or unknown person has or may have or claims an interest, actual or contingent, and in which the relief demanded consists wholly or in part in excluding him from an interest therein.

7. Where a nonresident or person unknown has or may have or may claim a present, future, or contingent interest in any property in this state.

8. And in all cases in which such person may have or claim any interest in any trust estate in this State, and it becomes necessary or proper or advantageous to order a sale of the whole or any part of such property, service upon such nonresident or unknown person may be perfected by publication.

The provisions of this section shall be supplemental to the other provisions in this Code providing for service by publication.

Section 81-207.1 provides as follows:

81-207.1 *Service by publication in other than divorce cases; how made.* — In all cases, other than actions for divorce, where service by publication is permitted under the law and where the defendant or other party shall reside out of this State, and it shall be necessary to perfect service upon such person by publication, upon the fact being made to appear to the judge of the court in which suit is pending, either in term or vacation, said judge may order service to be perfected by publication in the paper in which sheriff's advertisements are printed, four times within the ensuing 60 days, publications to be at least seven days apart. Said published notice shall contain the name of the parties plaintiff and defendant, with a caption setting forth the court, the character of the ac-

Ga. 347, 122 S.E.2d 217 (1961); *Pettie v. Roberts*, 214 Ga. 750, 107 S.E.2d 657 (1959); *Little v. King*, 211 Ga. 872, 89 S.E.2d 511 (1955); *Irons v. American National Bank*, 175 Ga. 552, 165 S.E. 738 (1933); *Hood Brick Co. v. Mangham*, 161 Ga. 457, 131 S.E. 172 (1925); *King v. Sullivan*, 93 Ga. 621, 20 S.E. 76 (1894). And since no method other than publication was attempted in serving process on New Central, the court below was correct in its decision to grant the motion to quash service.

CTI's final contention with respect to the dismissal of its third-party complaint — that "New Central had been represented by counsel of its choice at every state [sic] of the proceedings" — is simply an en-

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tion, the date the action was filed, the date of the order for service by publication, and a notice directed and addressed to the party to be thus served, commanding him to be and appear at the court in which the action is pending within 60 days of the date of the order for service by publication and shall bear teste in the name of the judge, and shall be signed by the clerk of said court. The date upon which the nonresident is called upon to appear shall be the appearance day of the case.

In our study of this case, we discovered that in 1966 the above-quoted statutes were "repeal[ed] for certain purposes" by the Georgia legislature. Ga. Code Ann. tit. 81-204, 205, 207.1 (Supp. 1969). No mention was made of this rather significant fact by either CTI or New Central in their briefs. We do not believe it is necessary to explore the point, however, for regardless of whether the statutes were repealed for the purposes of the service in the instant case, the outcome of this case will be the same. Thus, if the purposes for which the statutes were repealed coincided with the purposes of serviee of process in the instant case, the attempted service would have been invalid for being issued pursuant to a nonexistent statute. On the other hand, if the statutes were still in force for purposes coinciding with the instant case, then the case law under the statutes forbidding service by publication on nonresident defendants in actions *in personem* would render the service invalid.

deavor to raise again its first contention that New Central was "before the court." We have already rejected this argument.

Since we are unpersuaded by CTI's charge that New Central was "before the court" during this entire proceeding, and we are in agreement with the district court's decision to grant the motion to quash, we affirm the order dismissing CTI's third-party action against New Central.

IV.

CTI v. TALCOTT

We come now to the final dispute of these long and arduous proceedings — the dispute between CTI and Talcott. The Record discloses that soon after Talcott filed this statutory interpleader suit and deposited the contested fund in the registry of the court, it requested to be discharged from the suit and awarded attorneys' fees pursuant to 28 U.S.C.A. § 2361. CTI opposed this motion and sought to set up a counterclaim against Talcott in which it charged Talcott with numerous breaches of its fiduciary responsibilities in managing the fund.

On August 21, 1967, the court below entered an order discharging Talcott, awarding its $25,000 in attorneys' fees, and denying CTI's application to set up a counterclaim against Talcott. [Appendix at 167] A final judgment was never entered on this order, however, and in a later order, the district court construed CTI's counterclaim and the prior order as follows:

> CTI also filed a counterclaim against the plaintiff Talcott in the interpleader action which, in oral argument before the Court counsel stated is based solely on the contention that Talcott owed interest on the amount it held in excess of Talcott's own claims during the period prior to paying the funds into Court, and possibly, subsequent to that date, to the extent that the funds drew either no interest or less than the legal rate after deposit in the Court.
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> Upon subsequent motion by Talcott [the court] entered an order authorizing payment of $25,000 attorneys' fees for Talcott's counsel and discharging Talcott from any further liability with respect to the funds deposited. The order made no reference to, and therefore did not in any way dispose of the counterclaim by CTI against Talcott. I construe the order as merely discharging Talcott from any further liability *with respect to the funds actually deposited by it in this Court.*

310 F. Supp. at 9. This later construction of the prior order is rather confusing, since the prior order of the court did specifically mention CTI's counterclaim and disallow it. Moreover, at no subsequent point in its orders before entering final judgment did the trial court refer again to CTI's counterclaim. In its brief on this appeal, CTI states in its fourth point of error that "the final order of the court has retained CTI's counterclaim against Talcott in a pending status," but in the very same breath CTI urges that "CTI's counterclaim . . . should not have been dismissed for failure to state a

claim." [Appellant's brief at 39-40]. The posture of CTI's counterclaim is thus in a state of hopeless confusion. We cannot tell from the trial court's final order or from CTI's brief whether the counterclaim has been severed for separate consideration or dismissed for failure to state a claim. Indeed, it is not even clear that the counterclaim is before us on this appeal.[13]

In addition, the scope of the counterclaim is a mystery. For while the trial court wrote in its opinion that CTI's counsel stated in oral argument that it wished to limit the counterclaim to an accounting for interest, CTI in its brief on this appeal contends that the trial court "misunderstood CTI's position" on this point. We are also unable to resolve this dispute because no record was kept of the hearing below on Talcott's motion for discharge.

On remand, therefore, the trial court should clarify its order on both the status and scope of CTI's counterclaim against Talcott, and dispose of the issue accordingly.

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[13] Talcott has argued on this appeal that a counterclaim may not properly be interposed against a stakeholder in interpleader when the stakeholder has asserted no claim to the fund in suit. *See The Erie Bank v. United States District Court*, 10th Cir. 1966, 362 F.2d 529; *The First Nat'l Bank v. Johnson County Nat'l Bank and Trust Co.*, 10th Cir. 1964, 331 F.2d 325, 327; 1A W. Barron & A. Holtzoff, *Federal Practice and Procedure* § 398 (Supp. 1970, Wright ed.). *But see* 3A *Moore's Federal Practice* ¶ 22.15 n. 6. Since we are not even clear that the counterclaim is properly before us on this appeal, we decline to rule on this contention. The proper time for us to decide whether a counterclaim should have been allowed is after, not before, the district court has considered the question and ruled on it.

Finally, CTI appeals from the district court's award of attorneys' fees in the amount of $25,000 to Talcott. It does not attack the amount of the award, but contends that Talcott was not entitled to any award at all because Talcott acted in collusion with the Indian Banks. CTI's charges of collusion are totally unsupported by the Record. The law is clear that a district court has the authority to award within its discretion stakeholder costs, including a reasonable attorneys' fee in interpleader actions. Moore's *Federal Practice* ¶ 22.16[2]. We affirm the award in this case.

V.

CONCLUSION

Our disposition of this appeal is to REVERSE and REMAND for further proceedings not inconsistent with this opinion on the issue of the Banks' possession of the instruments in suit, to REMAND on the issue of CTI's counterclaim against Talcott, and to AFFIRM the judgment appealed from in all other respects.

AFFIRMED in part; REMANDED in part; REVERSED and REMANDED in part.

AINSWORTH, Circuit Judge, dissenting:

I am in agreement with much of the excellent majority opinion. However, I dissent from that portion of the opinion which affirms the granting below of summary judgment, based on the plea of collateral estoppel by judgment of the Indian Banks (Allahabad, Baroda and Tokyo) against City Trade & Industries, Ltd.

Thus on summary judgment, without a requested jury trial on the merits, and despite strenuous contentions of CTI as to important disputes on material facts, CTI is barred from claiming a large interpleader fund of $622,367.76 plus interest, on the basis of a New York State judgment, similarly granted on motion for summary judgment, in a proceeding in which the Indian Banks were not even parties.

I agree with the majority that this case must be remanded to require that the Indian Banks produce, if they can, the negotiable instruments (trade acceptances) upon which they assert claim to the entire interpleader fund. However, the case is reversed and returned to the District Court for a trial solely on that issue. The majority declines to require also a trial on the merits of the crucially important question of whether the Indian Banks are holders in due course of the negotiable instruments sued upon. CTI has put at issue the question of whether the Indian Banks are holders in due course of the purported trade acceptances but is denied a trial of this critical issue by the maintaining of the plea of collateral estoppel made by the Indian Banks.

CTI has never had a trial in any court on the merits of the issue of whether the Indian Banks are holders in due course, certainly not in the New York State Courts or in the Federal District Court below. Additionally, summary judgment was granted below though there was pending at the time an attempt by CTI to take the depositions of the principal officers of the three Banks and compel discovery of important documents in possession of the Banks. As the District Judge

himself said in his written reasons for summary judgment, "[T]hese issues have not been resolved." Summary judgment should not be granted while discovery is still being attempted by the party against whom the motion is asserted where possession of the requested information would assist in defeating the motion. CTI (in its most recent brief) refers to this unusual procedure as follows: "All motions to compel discovery were superseded and bypassed when the court entered summary judgment on behalf of the Indian Banks. A hearing was never had on Motions to Compel Discovery."

The New York State summary judgment resulted from a suit brought by CTI against New Central for an accounting under a written contract pertaining to the importation of jute. After it was filed the suit lay dormant. Then New Central took the initiative in the suit and on two days' notice by its counsel to CTI filed a motion for an order to compel CTI to arbitrate the issues and disputes there, and for a stay of the New York case pending proceedings in Georgia until arbitration be had between the parties with respect to these issues. New York has special statutory provisions to compel arbitration where a party is aggrieved by the failure of another to arbitrate, and for expedited trial thereof by the Court. See Section 7503(a),(b), C.P.L.R.[1] Several

[1]The special provisions read as follows:

"(a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court

additional days' delay on the motion were granted. The motion was supported only by an affidavit of counsel for New Central. Thereafter, a reply affidavit of CTI's counsel was filed stating that New Central was not entitled to arbitration because it had breached the contract by having the Indian Banks as alter egos file the Georgia proceedings. There followed a reply affidavit of New Central's counsel (not said to be or based on personal knowledge) which argued that the only issue was whether arbitration should be granted under the contract. In the New York State case, the question whether the Indian Banks were holders in due course was not an issue and the Indian Banks were not parties to the suit. However, New Central counsel's reply affidavit (not based on personal knowledge) in the New York case stated, " . . . the action in the State Courts of Georgia and Delaware were not instigated or instituted by Defendant herein, but by several banks which are holders in due course of certain drafts made by Plaintiff herein payable to the order of Defendant

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shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

"(b) Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be, arbitrated is barred by limitation under subdivision (b) of section 7502."

herein and accepted by Plaintiff and thereafter negotiated by Defendant herein to the said banks. No matter how hard Plaintiff may try to merge Defendant's identity with the banks, the fact is otherwise. The banks purchased the drafts from Defendant in the normal course of business and attempted to receive payment thereon from Plaintiff." No other evidence was before the New York Court. Summary judgment was eventually granted on the arbitration issue, solely supported by New Central counsel's affidavits. Such a summary judgment would be inappropriate in a Federal Court since it is based on counsel's affidavits, not made on personal knowledge, and therefore violates Rule 56(a), Fed. R. Civ. P. The New York State procedure (Rule 3212(b), C.P.L.R.) similarly provides that when a motion for summary judgment is supported by affidavit it "shall be by a person having knowledge of the facts . . . ."[2] This has been construed

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[2]Rule 3212(b), C.P.L.R., reads as follows:

"(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact other than an issue as to the amount or the extent of the damages. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

by the New York Courts, for example, in cases where an attorney makes the affidavit, to mean that the attorney must have personal knowledge of the facts or the motion is fatally defective, *Wick v. Cornrich Beverages, Inc.*, 1966, 27 A. D. 2d 595, 275 N. Y. S. 2d 745, and worthless, *French v. Colamaio*, 1968, 56 Misc. 2d 471, 288 N. Y. S. 2d 761. New Central's attorney did not have (nor does he state that he has) personal knowledge of the conclusory statements in his affidavit relative to the Banks being holders in due course. Nonetheless, the Federal District Court below predicated its summary judgment on collateral estoppel of the New York State judgment which was not properly supported by affidavit.

Based on the unsupported statement in New Central counsel's affidavit, not on personal knowledge of affiant, Justice Sarafite of the New York Supreme Court, New York County, said in his opinion that the Banks were holders in due course of the drafts executed by CTI. It is obvious that the statement relative to the Banks being holders in due course was pure dictum, and was not even before the Court for decision. The New York Justice had nothing to rely upon in this regard to back up his statement.

When the New York case ultimately reached the New York Court of Appeals, in an opinion by Justice Burks, New Central's right to an arbitration order was affirmed and CTI's alter ego contention was rejected as lacking sufficient evidentiary support. The final decision made no reference, however, to the Sarafite

dictum as to whether the Indian Banks were holders in due course.[3] The Federal District Court below was in nowise required to give effect — under the plea of collateral estoppel — to the Sarafite statement that the Banks were holders in due course. Nor should we be bound. The issue is still an open one — as open as the question of whether the Banks are in fact holders at all of the trade acceptances. The majority opinion has not stated that we are constrained to decide, on the principle of collateral estoppel, that the Banks are holders of the instruments. By the same token we should not be bound to a holding that the Banks are holders in due course and should remand that issue also for trial.

I do not believe it can be seriously contended that CTI has had a full and fair opportunity for a hearing on the issue of holder in due course. It has never had a hearing anywhere on this issue though it has consistently disputed the status of holder in due course of the Indian Banks. CTI was cut off without even being permitted discovery in the court below. We, therefore, have a classic case of the granting of a judgment against a litigant without due process of law.

It is said that a trend is developing toward the acceptance of the collateral estoppel doctrine. Professor

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[3]The opinion said that two Indian Banks had filed proceedings in Georgia and Delaware State Courts and that "In each case, the bank asserted its status as holder in due course of a draft received from New Central." Nothing more, however, on this subject.

Currie, an adherent thereof, points out, however, that "No legal principle, perhaps least of all the principle of collateral estoppel, should ever be applied to work injustice." Currie, Civil Procedure. *The Tempest Brews*, 53 Calif. L. Rev. 25, 37 (1965).

"The statement has frequently been made that a judgment has conclusive force only between persons who are parties to the action or in privity with them." 1B Moore's, Federal Practice ¶ 0.411 at 1251. Professor Moore, an advocate of the principle of mutuality, is in sharp disagreement with its critics. He states that "The doctrine of mutuality requires that, as a general proposition, one who invokes the conclusive effect of a judgment must have been either a party or his privy to the suit in which the judgment was rendered. Stated differently, the mutuality requirement prevents a litigant from invoking the conclusive effect of a judgment unless he would have been bound if the judgment had gone the other way. 'It is a principle of elementary law,' the Supreme Court has said, 'that the estoppel of a judgment must be mutual.'" (Citing by footnote *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 127, 32 S. Ct. 641 (1912).) 1B Moore's, Federal Practice ¶ 0.412 at 1801-02. Professor Moore continues. "Most state courts recognize and apply the doctrine of mutuality, subject to certain exceptions subsequently discussed. And the same is true of federal courts, when free to apply their own doctrine. A few courts, however, have renounced the doctrine of mutuality, in whole or in substantial part, and permit a litigant — normally a defendant — to invoke the con-

clusive effect of a judgment rendered in a suit to which he was neither party nor privy." Id. at 1803-05.

In the most recent case in which this Court has had occasion to discuss the principle of collateral estoppel, *Rachal and Hunnicut v. Hill*, 5 Cir., 1970, ____ F. 2d ____ [No. 29585, December 3], Judge Morgan writing for the Court quoted with approval the following excerpt from the leading federal case of the Third Circuit, *Bruszewski v. United States*, 1950, 181 F. 2d 419, 421, cert. denied, 340 U. S. 865, as follows:

> ". . . a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration require that this be so *unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case.*" (Emphasis supplied.)

I submit that the present matter is such a case.

In *Rachal*, the Court declined to apply the doctrine of collateral estoppel as being inappropriate under the circumstances, the Court holding, "[I]t would be anomalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages for violations of the security laws because of a prior adverse determination by the district court of the same issue in an action in which their present adversary was not a party and which arose in a different context from the present

action." Id. at ____. Therefore, *Rachal* strongly supports my dissenting views.[4]

It is conceded in the majority opinion by citation of *The Evergreens v. Nunan*, 2 Cir., 1944, 141 F. 2d 927, cert. denied, 323 U. S. 720, 65 S. Ct. 49, that we are free to go beyond the judgment roll to ascertain what facts have been conclusively established in the prior action. When we do so, we find that there was no actual litigation in New York of the issue of the Banks being holders in due course, that the Banks were not parties to the proceedings, that the context of the New York case was whether arbitration should be ordered as between CTI and New Central, that the statement of Justice Sarafite that the Banks were holders in due course of the trade acceptances was pure dictum and was supported solely by an affidavit of New Central's counsel (not on personal knowledge), and that the highest New York Court in finally deciding the case did not determine whether the Banks were holders in due course and did not pass on this issue.

All of this being true, it seems inescapable that we should reverse the District Court's ruling that the principle of collateral estoppel is applicable under the

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[4]The following from 1B Moore's, Federal Practice ¶ 0.443[5], at 3919, is especially pertinent:

> "Even though an issue was raised and fully litigated in a prior action, and a finding on the issue was made by the court preliminarily to rendition of judgment, the issue is not concluded by the resulting judgment unless the finding made on the issue was, at least

circumstances here, and in the remand of the case we should open for full litigation and trial on the merits the issue of whether the Banks are holders in due course of the instruments sued upon in this case.

I respectfully dissent.

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alternatively, necessary to the judgment rendered. Thus an incidental or collateral determination of an issue that was not material in the prior action does not foreclose reconsideration of that issue in later litigation in which the issue is material." (Citing numerous cases by footnotes in support of the text.)

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APPENDIX B

Opinion of the United States District Court for the Southern District of Georgia

TUTTLE, *J.*

The Court has for disposition the motion for summary judgment filed on behalf of Allahabad Bank, Ltd., Bank of Baroda, Ltd., and Bank of Tokyo. The motion requests a judgment by this Court distributing funds amounting to approximately $650,000.00 now in the hands of the Clerk of the Court as a result of a deposit made by the Plaintiff Talcott, Inc. in connection with its bill of interpleader seeking a determination of the proper disposition of this very substantial sum of money as between the three named banks and the City Trade and Industries, Ltd. and any other claimants who might intervene in the action.

The movants (hereinafter the Banks) based their contention that they are entitled to the entire fund upon the undisputed fact that litigation has now terminated in the Courts of New York State by a decision of the New York Court of Appeals in which City Trade & Industries, Ltd. (hereinafter CTI) has sought relief in the nature of an accounting from New Central Jute Mills Co., Ltd., an Indian Corporation, and which litigation the Banks contend made a final determination against certain contentions of CTI which the Banks now rely on as creating collateral estoppel which prevents CTI from asserting in this Court its only contention standing in the way of final judgment on their motion for summary judgment in favor of the Banks.

The parties are not in disagreement as to the requirement for the granting of a motion for summary judgment. Such a motion cannot be granted unless the Court can properly determine that there is no material issue of fact which, if proven by the opposing party, would entitle it to a judgment. In order to consider whether such an issue remains in this case it is necessary to consider at some length the history of the relationship between the parties. By reference to the complaint filed by CTI in this New York litigation and which, in view of CTI's position in this case, may be taken as true against it, it appears that the following abbreviated statement in an earlier order entered by the Honorable Frank M. Scarlett dated the 9th day of March, 1967, is fully supported and does not involve any conflict between the parties on any material issue.

"In India there is a concern that produces jute, which is a backing used for rugs and carpets, named New Central Jute Mills. During 1959 and March, 1964, or substantially this period of time, City Trade and Industries, Ltd., a New York Corporation, was sales agent for New Central Jute Mills in the United States and Canada.

In 1964, these two parties severed their business relationship and entered into an agreement. Their business relationship has not been described to the Court in great detail, but from what has been set forth it worked in substantially the following manner. New Central would produce a quantity of jute and export it to the United States. It would be stored in various warehouses located in different states to the account of CTI. New Central watched the market for the best jute prices; often it would direct CTI to hold the jute in storage pending a more favorable market. Without selling the jute within in a period of

approximately 90 days from date of export, New Central would require outside funds. James Talcott, Inc. entered the picture as a factor and apparently took a first security interest in quantities of jute to secure funds it advanced.

There was another feature to the financing and that was the drawing of drafts by New Central upon CTI. Apparently, New Central would draw a draft upon CTI and if New Central would not allow the jute to be sold within a definite period of time, CTI would not honor the draft, if it had accepted it, or would call in James Talcott, to take a security interest in the jute, and to pay the draft that CTI had accepted.

When New Central and CTI ceased doing business together in 1964, they agreed that CTI was to return all inventory to New Central at cost and expenses, that CTI was to pay the outstanding drafts of over $900,000.00 and that cost and expenses to which CTI was entitled was approximately 3 and ½ million dollars.

CTI contends that New Central never paid the stated account, and that it proceeded to sell the jute over which it had control, and reduced the debt owing to it from New Central to approximately 1 and ½ million dollars.

At this point, in September, 1964, the Allahabad Bank and the Bank of Baroda filed a suit of attachment in Chatham County Superior Court; at the least, an attempted attachment was made of property stored in the Georgia Ports Authority warehouse to the account of CTI. Later, the Bank of Tokyo was added as a party plaintiff. In addition, James Talcott, Inc., was brought into the proceedings by a process of garnishment.

On or about November 30, 1964, the parties entered into an agreement whereby various quantities of jute cloth were to be released to the order of James Talcott, Inc. Ap-

parently, all the jute stored in Savannah at the Georgia Ports Authority warehouses was sold, at the order of James Talcott, Inc., and after satisfying its liens, Talcott has paid into Court the excess funds from the sale of jute."

The last clause in Judge Scarlett's recitation of facts needs clarification to the extent that Talcott paid the funds into this Court, not in response to the garnishment, but by an original suit in interpleader in which it is alleged that it was subject to claims not only by the Indian Banks but by CTI and possibly other claimants. It originally paid into Court the sum of $622,367.76. It later paid in the sum of approximately $45,000.00 additional which it conceded to be due to some of the parties at interest by reason of accrual of interest. Originally the funds were held by the Clerk of this Court in local banks without drawing interest but by subsequent order of this Court the funds were placed at interest in the same banks. The interest currently being earned is not equal to the interest claimed by the Indian Banks to be currently accruing on its drafts, which are the basis of the litigation.

Further facts necessary to an understanding of the case are that at a time when the business of the several parties was continuing Allahabad Bank held drafts drawn by Central Jute and accepted by CTI in the principal sum of $343,915.26, the Bank of Baroda held similar drafts in the amount of $26,850.94 and the Bank of Tokyo held similar drafts in the amount of $169,372.31. The principal amount of these claims is $540,138.51.

By their answers to the bill of interpleader the Banks claimed the full amount paid in as due them on their drafts duly accepted by CTI, payment of which had been refused. They also sought protest fees totalling $150.79.

CTI, after first contesting jurisdiction and venue, nevertheless later waived these points, and made its answer claiming the entire fund upon the following theory: CTI contended that, in point of fact, the claims by the Indian Banks were subject to all defenses existing between CTI and New Central Jute because, so it contended, these drafts were not in fact held by the Banks as holders for value in due course. This contention was based upon the allegations that the Banks had either been paid the amount of the drafts by New Central Jute or had in some other manner, by compromising the relations between New Central Jute and CTI, lost their position as holders for value in due course.

It is apparent that such a contention, attacking negotiable instruments held by the Banks could hardly be proved by counter-affidavits with the technical requirements of the federal rules effectively to deny the affidavits supporting a motion for summary judgment on behalf of the Banks as holders of negotiable instruments, apparently valid on their face. To meet this situation, therefore, CTI served notice of taking depositions of the principal officers of the Banks in Savannah, Georgia and filed voluminous interrogatories. Equally detailed objections to the taking of depositions and the interrogatories were filed by the Banks, and these issues have not been resolved.

CTI also filed a counterclaim against the plaintiff Talcott in the interpleader action which, in oral argument before the Court counsel stated is based solely on the contention that Talcott owed interest on the amount it held in excess of Talcott's own claims during the period prior to paying the funds into Court and, possibly, subsequent to that date, to the extent that the funds drew either no interest or less than the legal rate after deposit in the Court.

Upon subsequent motion by Talcott, Judge Scarlett entered an order authorizing payment of $25,000 attorneys' fee for Talcott's counsel and discharging Talcott from any further liability with respect to the funds deposited. The order made no reference to, and, therefore, did not in any way dispose of the counterclaim of CTI against Talcott. I construe the order as merely discharging Talcott from any further liability *with respect to the funds actually deposited by it in this Court.*

The motion for summary judgment now before the Court is, as stated above, based upon the result from litigation in the State of New York. The Indian Banks contend that in that litigation the New York Courts have expressly held that they are holders for value in due course of the drafts upon which they are proceeding here, and that there is no merit in the contention of CTI that the proceedings in this Court were instigated by, or are being carried on for the benefit of, New Central Jute which is the true party at interest in the litigation and the Indian Banks.

The facts relating to the New York litigation are somewhat complex, but they can be capsulated. CTI sued Central Jute for breach of a contract and for an accounting when their relations terminated in a manner which CTI contended was contrary to the terms of their then existing contract under which they were acting as the agency in the United States for the sale of New Central Jute's products. New Central Jute filed a motion in the New York Supreme Court, in which Court the case was pending, seeking a stay of the suit unless and until CTI, the plaintiff, carried out the agreement in the contract between the two parties which New Central Jute contended required arbitration of any such dispute prior to litigation. In opposing New Central's motion for a stay pending arbitration CTI submitted an affidavit by one Gabriel Kaslow, Esquire in which Mr. Kas-

low asserted that on March 9, 1964, New Central and CTI entered into a written letter agreement whereby the account between them was established as of February 11, 1964 substantially as follows:

"(a) As of date of February 11, 1964 there was on hand in the United States inventory of wide jute of $3,271.673 yards and 1,260,238 yards of narrow jute of which New Central was entitled to possession upon payment to CTI of the agreed sum of $3,447,393.43.

(b) There were then outstanding unpaid *drafts* aggregating $919,134.43 drawn by New Central on CTI *and* accepted by CTI for the *accommodation of New Central* above set forth and upon CTI's receipt of the aforesaid sum of $3,447,393.43 CTI was to pay said outstanding drafts." (emphasis added)

The affidavit then says, "In March, 1964 and thereafter, except as hereinafter set forth, said drafts were alleged to be held by the following banks in the amounts set opposite their names:

State Bank of India, an agency of the Reserve Bank of India	$378,995.92
Allahabad Bank	343,915.26
Bank of Tokyo, Calcutta Branch	169,372.31
Bank of Baroda, Ltd.	26,850.94
	$919,134.43

"At this point, brevity requires me to say simply, that New Central repudiated and disavowed its aforesaid letter agreement of March 19, 1964 and therefore CTI did not pay the aforesaid drafts. New Central through the medium of

three of the banks aforementioned (other than the State Bank of India) has literally litigated CTI's jute business into ruin as hereinafter related." It is to be noted that except for the first item above listed these outstanding drafts represent the identical amounts claimed here by the Indian Banks.

Initially, in his affidavit, Mr. Kaslow stated that he opposed the motion "upon the following grounds." We are not concerned with numbers 1 and 3 but number 2 reads as follows: "At the instigation of New Central and under the direction and control of New Central, CTI has been the subject and victim of litigation in the Georgia State Courts since September 19, 1964 . . . wherein *certain banks domesticated in India have sued CTI* by attachment process *for the sole and exclusive benefit of New Central.*" (emphasis added)

In further elaboration of this charge Mr. Kaslow stated, "On behalf of CTI I hereby charge that Mr. Carroad [alleged to be an agent of New Central Jute] at his own instance and for his own benefit and at the instance and request of New Central, proceeded to retain counsel at Savannah, Georgia to commence suit by attachment at Savannah, Georgia of the substantial inventory of New Central Jute which had been the subject of dealing between CTI and New Central, Savannah being a principal port of entry for jute, *although the Georgia* . . . litigation *was instituted in the names of banks as plaintiffs against CTI as defendant. I hereby further charge that such suits was commenced solely and exclusively upon the joint instigation of Mr. Carroad and New Central.*" (emphasis added)

After stating the facts already alluded to above to the effect that the parties agreed to let Talcott dispose of the jute and hold the proceeds, Mr. Kaslow said, "I wish to conclude with respect to the State Court actions in

Georgia and Delaware, by stating that *all of them were instigated by New Central.*"

Mr. Kaslow attached as an exhibit to his affidavit a letter which he had written to New Central Jute Mills which he stated to be still his position, and in this letter he stated, "In your letter you referred to eighteen bills of exchange aggregating US 378,995.92 which you state were accepted by CTI and held by you. I wish immediately to state that CTI did accept said eighteen bills of exchange for your accommodation and that such bills of exchange which are held by you are subject to the off-setting indebtedness owing by you to CTI which you have refused to pay, notwithstanding that your indebtedness to CTI far exceeds not only the eighteen bills of exchange aggregating $378,995.92 referred to in your letter of July 21, 1966, but also exceeds all the other outstanding bills of exchange *accepted by CTI for your accommodation aggregating $540,139.17.* [This obviously refers to the bills of exchange here in issue.] As you are well aware, we have persistently advanced the proposition on behalf of CTI that there are no holders in due course of such outstanding bills of exchange and that in fact all of them are owned and held by you, and therefore that all of them are subject to being offset by your indebtedness to CTI . . . . In the view of CTI, in which we concur, the remaining bills of exchange aggregating $541,139.17 [the bills here in issue] which are the subjects of legal actions against CTI prosecuted in the State of Georgia, United States of America, in the names of Allahabad Bank, the Bank of Tokyo, Calcutta Branch, and Bank of Baroda, are in fact actions brought by you against CTI in the State of Georgia, notwithstanding that in the names of said banks the assertion has been made in the Georgia Courts that said banks are holders in due course

of said bills of exchange, notwithstanding that the same appear to be owned and held by you, and are therefore subject to being offset by your indebtedness to CTI."

New Central Jute's counsel Burton DeFren, Esquire responded to this affidavit in which the following statement was sworn to: "The second basis for opposition to the within motion is that plaintiff has been sued in the State Courts of Georgia and Delaware concerning transactions arising out of the contract. This ground is interesting, but neither informative nor relevant. *The fact of the matter is that the action in the State Court of Georgia and Delaware were not instigated or instituted by defendant herein, but by several banks which are holders in due course of certain drafts made by plaintiff herein payable to the order of the defendant herein and accepted by plaintiff and thereafter negotiated by defendant herein to said banks.* No matter how hard plaintiff may try to merge defendants' identity with the banks, the fact is otherwise. *The banks purchased the drafts from defendant in the normal course of business and attempted to receive payment thereon from plaintiff. Upon dishonor of the drafts by plaintiff the banks brought suit against defendant.* (emphasis added) Reams and reams of paper could not vitiate that the banks were and are holders in due course and that plaintiff herein is the debtor primarily liable under said drafts. Plaintiff made and accepted the draft as consideration for merchandise purchased from the defendant. Defendant thereafter negotiated those drafts for value to the banks. Defendant and the banks are separate and independent entities. One is not the alter ego of the other."

Mr. Justice Sarafite of the Supreme Court of New York passed on the motion filed by New Central Jute for an order

to compel arbitration after considering the foregoing affidavits. He held that the contention of CTI that the contract between it and Central Jute provided for an unlawful price fixing arrangement could not be passed on on the papers but should be heard on the merits. He then overruled the contention of an alleged waiver, and then said, "similarly, the claim that defendant has waived its right to arbitration, by having 'fostered' litigation against plaintiff in another forum, is without merit. It is sufficient to note that *the actions instituted in these other forums were brought by banks who were holders in due course of drafts executed by plaintiff*. It strains credulity to conclude, as plaintiff urges, that these other parties are defendant's 'alter egos' acting at [its] instigation and command.' " (emphasis added)

Thus the New York trial court held that two of the grounds alleged for denying a stay for arbitration as required in the contract were without merit. One of these is the very issue pending here, i.e. that the Indian Banks are not holders in due course and are not suing in good faith but are acting as alter egos for the New Central Jute Company. The Court held that the issue of whether there had been illegal price fixing would have to be tried. Subsequently, that issue was tried and the Supreme Court Judge, hearing that issue, held, on a stipulated state of facts, that there was nothing illegal in the contract or in the course of dealings pursuant to it. This ruling was appealed to the Appellate Division of the New York Supreme Court which affirmed and, on appeal to the Court of Appeals, CTI again urged the same ground which had been held adversely to it and with which we are here concerned, that is that New Central Jute had waived its right to arbitration under the contract because it had caused these three

banks to pretend to act as holders in due course and filed proceedings of attachment in the Georgia State Court and later to claim in the interpleader action that they were entitled to the funds as holders in due course.

The New York Court of Appeals dealt with this matter in its opinion in the following language: "CTI advances three points on this appeal. The argument is made at the outset that the defendant is precluded from asserting its rights to arbitration because of its alleged involvement in prior litigations against the plaintiff in order jurisdictions through various 'alter egos.' Specific reference is made to prior proceedings conducted in the Georgia and Delaware State Courts. Both actions were attachment proceedings, brought by two Indian Banks against quantities of jute backing located in the respective jurisdictions. In each case, the bank asserted its status as holder in due course of a draft received by them from New Central. The status of 'alter ego' is inferred by plaintiff from the participation of the defendants' attorney as an advisor to these foreign banks in the attachment proceedings. Without additional evidence to support it, this claim must be dismissed as meritless. As Justice Sarafite observed, after setting forth the exact nature of these proceedings, "It strains credulity to conclude, as plaintiff urges, that these other parties are defendants' 'alter egos' acting at [its] instigation and command."

The Court then proceeded to the second and third contentions, finally concluding that the objection of CTI to the claim by New Central Jute of the right to have arbitration was meritless on all three grounds.

There, of course, are no issues of fact as to the existence of the litigation in the New York Courts nor as to what actually transpired there. The only question, so far as this motion is concerned, is: Did it resolve the issue that is now

sought to be raised by CTI again to the effect that the Indian Banks are not the holders in due course because they are acting merely as alter egos for New Central Jute and attempting to circumvent the final accounting with CTI. An excellent discussion of "the principal somewhat undescriptively called 'collateral estoppel'" is contained in a scholarly opinion written by Judge Friendly on behalf of the Court of Appeals for the Second Circuit in *Zdanok* v. *Glidden Company, Durkee Famous Foods Division*, 2d Ct. 1964, 327 F.2d 944, where at page 954 we find the following discussion touching on the question whether a prior decision on the precise point in issue can be urged as an estoppel to a party who was a party to the earlier litigation. The Court said that the old doctrine that estoppels must be "mutual," that "nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary," citing *Bentham Rational of Judicial Evidence in Seven Works of Jeremy Bentham*, 171 (Bowring Ed. 1843); quoted in *Curie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281, 284, Footnote 6 (1957), "has been much eroded in recent years." The Court then says, "Perhaps the leading federal decision is Judge Hastie's in *Bruszewski* v. *United States*, 181 F.2d 419, 3d Ct., cert. denied 340 U.S. 865, 71 S. Ct. 87, 95 L. Ed. 632, 1950, which this Court followed in *Adriaanse* v. *United States*, 184 F.2d 968 (2d Ct., 1950), cert. denied 340 U.S. 932, 71 S. Ct. 495, 95 L. Ed. 673 (1951). We see no purpose in multiplying citations since it is recognized that the widest breach in the citadel of mutuality was rammed by Justice Traynor's opinion in *Bernhard Bank* v. *Bank of America*, 19 Cal.2d 807, 811-813, 122 P.2d 892, 894, 895. Having explained why 'the criteria for determining who may assert a plea of *res judicata* differ fundamentally from

the criteria for determining against whom a plea of *res judicata* may be asserted' and that there is 'no compelling reason . . . for requiring that the party asserting the plea of *res judicata* must have been a party, or in privity with a party, to the earlier litigation,' he said: "In determining the validity of a plea of *res judicata* three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party *against whom the plea* is asserted a party or in privity with a party to the prior adjudication?" (emphasis added) 327 F.2d at page 955.

In this case we have the identical question raised by CTI in New York which it seeks to raise here. It was raised by CTI in New York litigation in the manner permitted under the Civil Practice Act of that State. Although it related, in a sense, to a collateral issue in that litigation, this collateral issue was pursued to a conclusion at the behest of CTI. If the New York Court had accepted as true the contentions made by CTI it would have prevailed in the matter it was then urging on the New York Supreme Court. Rather, however, CTI did not prevail. The New York trial court held against CTI as to this point. It nowhere appears that CTI was in any way inhibited from making such additional or further or different form of proof than it relied on in presenting the affidavit with the attached exhibits of Mr. Kaslow. The issue was clearly drawn by the counter-affidavit of Mr. DeFren. The matter was then submitted to the trial court for determination and upon an adverse ruling, it does not appear that on the subsequent appeal, CTI complained in any way that the issue should not have been decided on the merits by Mr. Justice Sarafite on the then state of the pleadings. The action of the trial court was

affirmed in the Appellate Division so far as related to the matter germane to this issue, and the Court of Appeals expressly affirmed it after denominating it one of three contentions urged before it by CTI.

We conclude that there was thus a final judgment on the merits on the identical issue that is here sought to be adjudicated and that CTI, *against whom the plea is here asserted* was obviously "a party . . . to the prior adjudication."

I conclude therefore that the basis for CTI's opposition to the motion for summary judgment in favor of the Indian Banks may not now be re-litigated and, there being no other material issue of fact on this principal issue in the case, the Banks' motion for summary judgment must be granted.

This 17th day of October, 1969.

ELBERT P. TUTTLE
Judge, United States Court of Appeals
(designated to sit in this Court)